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IN THE

Supreme Court of the United States

October Term, 1967

No. 618

FORTNIGHTLY CORPORATION,

Petitioner,

v.

UNITED ARTISTS TELEVISION, INC.,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rules 35 and 42(3) of the Rules of this Court, the American Society of Composers, Authors and Publishers (ASCAP) respectfully moves this Court to grant ASCAP permission to file a brief *amicus curiae* on the following grounds:

1. ASCAP has requested permission of both parties herein to file *amicus curiae* in support of respondent. On February 7, 1968, petitioner Fortnightly Corporation refused such permission, but indicated that it did not intend to file a brief in opposition.

2. ASCAP is an unincorporated membership association authorized by its 8,469 composer and author-members and 2,788 publisher members to grant nonexclusive licenses for the performance of their copyrighted musical compositions in public for profit. The members reserve the right to license performances of their works independently of the Society. To the extent that their works are used on television and CATV, they will be directly and substantially affected by the final decision in this case. Thus ASCAP is particularly concerned about the outcome of this case.

3. Petitioner challenges the very foundation of copyright practices in the performance branch of the entertainment world, where each entrepreneur engaged in presenting performances of a copyrighted work pays the author or copyright owner a sum related to the participation of the particular entrepreneur in the total amount paid by the public for the performance. Having faced these problems for over half a century, ASCAP believes that it is in a unique position to present to the Court the views and experiences of its writer-and music publisher-members, many of whom depend for their livelihood on the income from the use of their works in public performances for profit.

4. Exercising rights in these performances safeguarded by the copyright laws, ASCAP's members make their works available to all users on a nonexclusive basis. They do not issue exclusive performance licenses to any broadcaster, network or other user.

5. Performance rights in musical works are limited by the Copyright Act to those performances which are both "public" and "for profit" (17 U.S.C. § 1(e)). This appeal

involves performance rights in dramatic works under 17 U.S.C. § 1(d). Unauthorized public performances of such works constitute infringing uses even though they are not "for profit". Copyrighted musical works are among the programs of all CATV systems including petitioner's, and the rights of composers and authors of these works will be affected by the decision in this case. The practices prevailing in licensing uses of these works should be considered. They are not likely to be brought to this Court's attention by the parties to this suit.

Respectfully submitted this 12th day of February, 1968.

HERMAN FINKELSTEIN
SIMON H. RIFKIND
JAY H. TOPKIS
PAUL S. ADLER
Attorneys for Amicus Curiae
575 Madison Avenue
New York, New York 10022

Of Counsel:
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
575 Madison Avenue
New York, New York 10022

February 12, 1968

IN THE

Supreme Court of the United States

October Term, 1967

No. 618

FORTNIGHTLY CORPORATION,

Petitioner,

v.

UNITED ARTISTS TELEVISION, INC.,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *AMICUS CURIAE*

As the District Court pointed out, 255 F. Supp. 177, at 180, the petitioner's two cable television systems are "large-scale commercial enterprises advertising and promoting television programs, and making profit out of the exploitation of television programs . . ." and employ not mere simple "antennas" but elaborate, expensive rebroadcasting equipment.

Cable television had its beginnings in cooperative or municipal community antenna systems in areas with little or no access to television stations. But, as petitioner pointed out in its brief below, it is now "the fastest growing mass communication medium on the American scene". It is also one of the most lucrative, today collecting from its subscribers more than $150,000,000 annually. The value of

these systems is in excess of a billion dollars.[1] Often CATV operations are far more profitable than television stations, attracting such giants as the General Electric Company, Westinghouse and other large scale operators (see table attached to supplemental letter statement of Herman Finkelstein before the Senate Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary on S. 1006, September 6, 1966, annexed hereto as Ex. A and printed in *Hearings on S. 1006 (Copyright Law Revision—CATV) Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., at 237-239 (1966)).

It is entirely possible that in the evolution of the television industry—with communications satellites replacing the present scheme of networks and affiliated stations—cable television will be the natural purveyor of most programs beamed by satellite. As the Solicitor General's Memorandum suggests, there may be a CATV network which will rival the present three television networks (Sol. Gen. Memo., p. 7, n. 4). A CATV network, capable of supplying several of the 20 channels in each CATV system is bound to be more powerful than the present TV networks which supply only a single channel in each market. Thus, in time, the largest commercial interest in television performances may be that of the cable television operators.

Some of the programs carried by CATV systems are broadcast initially by educational television stations. To the extent that CATV delivers to its subscribers the musical programs of those non-commercial stations, the CATV system is the only commercial enterprise associated with those performances. The stations do not pay for the performances, either because they have gratuitous licenses from the copyright owners, or because they assert that

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[1] A projection of the figures cited by the National Cable Television Association in its brief as *amicus* (p. 4), shows that there are 2,5512,500 CATV subscribers. When CATV systems are sold their value is usually computed at $400 per subscriber. Thus the systems, having 2,512,500 subscribers, are worth $1,005,000,000.

the performances are not "for profit" and therefore are exempt under Section 1(e) of the Copyright Act. These educational stations are increasing at a faster rate than commercial stations. It is profitable for CATV systems to furnish the programs of those educational stations to their subscribers.

Description of ASCAP

ASCAP is an unincorporated membership association organized under the laws of the State of New York with over 10,000 author, composer and publisher members who own copyrights in separate musical compositions. Each member grants to ASCAP, for a limited period, the non-exclusive right to license nondramatic public performances for profit of the member's copyrighted compositions. All members reserve the right to license their works individually. ASCAP may not license individual compositions unless both the members and the user request it to do so.

ASCAP licenses many thousands of users of music throughout the United States. Among the performances licensed by ASCAP (on either a paying or gratuitous basis) are those given by means of radio and television networks and stations (both commercial and educational), wire music systems, FM background music systems, and performances addressed to specific audiences at places such as hotels, nightclubs, restaurants, and supermarkets.[2]

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[2] In passing, it may be noted that in the developing stages of new media ASCAP has granted free licenses on request, or has refrained from pressing claims for infringement. Until 1949 ASCAP granted television stations royalty-free licenses "in an endeavor to assist the stations and promote the growth of the industry," as the court noted in *United States* v. *American Society of Composers, Authors and Publishers,* 331 F.2d 117, 121 n. 4 (C.A. 2). Indeed, ASCAP has stated publicly in discussions with representatives of NCTA (National Cable Television Association) that it will make no claim for past infringements and that any future agreement arising out of present discussions will be retroactive to the date those discussions commenced—approximately January 1, 1968.

ASCAP performs a virtually indispensable service both for its members and for the users of their music. By dealing with ASCAP, the user may avoid the necessity of dealing with a separate copyright proprietor for each composition performed. And by belonging to ASCAP, the individual member is spared what would be the impossible task of attempting to negotiate license agreements for each use by radio stations, television stations, restaurants, taverns and myriad other users all over the United States.

ASCAP's Licenses—Its Members' Interest in This Controversy

Inasmuch as the performances of ASCAP music by petitioner are those which are carried over television stations or networks before being picked up by petitioner and furnished to its subscribers—who cannot view and listen to these performances unless a fee is paid to petitioner—it is appropriate to examine the license agreement with ASCAP under which the television network or station makes its particular use.

The typical ASCAP license to a television station or network grants the right to the licensee to perform works in the Society's repertory over the particular network or station, and then contains the following express limitation:

> . . . nothing herein contained shall be construed as authorizing LICENSEE to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions licensed hereunder or as authorizing any receiver of any television broadcast to perform publicly or reproduce the same for profit, by any means, method or process whatsoever.

Pertinent Provisions of the Copyright Law

The rights licensed by ASCAP are those defined in Section 1(e) of the Copyright Law, U.S.C. Tit. 17, as follows:

> (e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced.

There are only two limitations on the right of "public performance for profit": one is contained in the last paragraph of Section 1(e). It provides that

> The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.

The other limitation is contained in Section 104 of Title 17. It exempts certain nonprofit, charitable and educational performances. It provides:

> . . . That nothing in this title shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit.

Questions Involved

1. Does petitioner, in its operation of a commercial cable television system, participate in a "public performance" of copyrighted works within the meaning of the copyright law?

2. Did Congress by enacting the Federal Communications Act, overrule, *sub silentio*, express provisions of the Copyright Act in favor of owners of cable television systems?

3. Shall copyright owners be deprived of rights without compensation in favor of owners of CATV systems in spite of the express grant of such rights by the Copyright Act?

4. Should the Courts "imply" an exemption in favor of petitioner from its express statutory obligation to respect the performance rights of copyright owners?

Summary of Argument

Petitioner, representing an industry that is one of the most profitable and fastest growing commercial ventures in America, seeks an exemption from the application to it of the performing right provision of the Copyright Law. By resorting to a legal fiction—a license implied in law—these private enterprises, including some of the nation's largest commercial interests, would confiscate the rights of authors for their private profit without compensation. As this Court said in *Herbert* v. *Shanley Co.*, 242 U.S. 591, 594, "there is no need to construe the statute so narrowly."

Petitioner and other CATV systems make greater profits from the programs furnished to their subscribers than do many broadcasters. They are more capable of

paying than authors are of sacrificing their royalties. A leading CATV operator has indicated that such royalties "would constitute a relatively small element in the total cost of providing a service desired by the public."[3]

The Copyright Law should not receive a narrow interpretation which would prevent authors from receiving compensation for their creative works in proportion to their value to each commercial user profiting from performances.

If an exemption were created to favor CATV, in response to its claim that it is a young industry, it will remain after CATV becomes a giant. CATV is likely to become the dominant financial force in the communications industry. There is a compelling analogy in the application of Section 1 (e) of the 1909 Copyright Act to the juke box industry—a relatively new and minor use in 1909, but which has become the largest commercial user of music, but pays nothing for the performance of copyrighted music.

The Communications Act of 1934 did not contemplate an exemption for radio, television or CATV although many have suggested it in the past for radio and other users.

If any copyright owners misuse their copyrights in dealing with CATV, they should be vigorously prosecuted; but the possibility of such abuse should not give rise to an exemption from payment to innocent authors under the guise of an "implied license."

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[3] Statement of J. Leonard Reinsch (See statements quoted in Ex. A annexed hereto).

ARGUMENT

I

Petitioner is Engaged in Presenting Public Performance Through Its Cable Television Service

In view of the exhaustive review of the law and facts relating to petitioner's responsibility for the performances involved in this case, this brief will not review that subject further.

It should be noted, however, that if petitioner is not responsible for the performances in this case, then CATV systems, however large and profitable, would not be required to pay for performances consisting of musical programs originated by educational television stations which pay no fees to copyright owners because (a) they assert that they do not perform "for profit" or (b) the copyright owners, including ASCAP, have given them gratuitous licenses on request.[4] In that event the composers and copyright owners would receive nothing for a performance of their works which is clearly both public and for profit.

Cable television is not unique in furnishing to the public performances which have been originated by someone else and thus deserves treatment no different from that given other media which operate in much the same way. For instance, the great bulk of radio programs consist of broadcasting performances recorded on phonograph records. And whether the recording was made with the express consent of the copyright proprietor or pursuant to the Copyright Act's compulsory licensing provisions (17 U.S.C. § 1(e)), it is clear that the broadcaster, using the necessary electrical impulses to present the recorded performance on the home receiving sets of the public at large, is itself engaged in presenting the performance.

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[4] To date ASCAP has granted gratuitous licenses for its entire repertory to 321 educational radio and television stations.

It is abundantly clear that a cable television operator who picks up and transmits a television broadcast is as much responsible for participating in the performance as a broadcaster who picks up and transmits any other performance. In the case of the broadcaster the performance is "public" because of the steps he takes to activate the necessary electrical impulses which are designed to carry the performance to members of the public who have the equipment necessary to translate the impulses back into the sound of the original performance. The broadcaster and the viewer have no direct contact with each other. In the case of the cable television operators, there is the additional element of an actual agreement between the system and the intended audience—each subscriber's home set is connected to the system when, and only when, that agreement is entered into. Once the home set is connected to a CATV cable, it can thereafter receive and reproduce only those programs which are supplied by the CATV operator.

It has been held time and again that all who are engaged in the presentation of a performance are responsible for that performance even though, as in the case of a radio broadcast, the decision to "tune in" on the particular program supplied by a radio station is made by individuals in their respective homes without any direct relationship with each other or with the broadcaster. *Jerome H. Remick & Co.* v. *American Auto. Accessories Co.*, 5 F.2d 411 (C.A. 6) *cert. denied* 269 U.S. 556; *Jerome H. Remick & Co.* v. *General Electric Co.*, 16 F.2d 822 (S.D.N.Y.). See also as to hotels, *Buck* v. *Jewell-LaSalle*, 283 U.S. 191; *Society of European Stage Authors and Composers* v. *New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y.); and as to wired music systems, see *Harms, Inc.* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E.D. Pa.), *aff'd per curiam sub nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F.2d 494 (C.A. 3).

The fact that cable television does not produce its own programs is immaterial. Radio stations playing records or tapes do not produce their own musical programs; nor do network affiliates when they broadcast network programs. Yet no one disputes the fact that they are responsible for their participation in the performance carried over their stations. A restaurant performing a recorded composition emanating from a remote turntable and delivered by a wired music service is engaged in giving a performance—as is the wired music supplier. *Harms, Inc.* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E.D. Pa.), *aff'd sub nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F.2d 495 (C.A. 3). If petitioner's contention were upheld, a supplier of wired music would be liable to the copyright owner if he bought a phonograph record and transmitted the vibrations reproduced by application of a needle to the record spinning on his turntable. Yet he would not be liable if he obtained the same vibrations by tapping the channel of a "good music" FM radio station having little or no advertising and paying little or nothing for the right to perform copyrighted music. To the subscribers of a commercial "music service" the music sounds the same whether the turntable on which the record is placed is located at the premises of the music service or at the FM station. There is no reason why the author should be paid by the commercial user in one case and not in the other.

II

In Interpreting the Performance Right Provisions of the Copyright Act, the Law Should Enable Authors and Users to Continue their Practice of Determining the Amount to be Paid by Relating it to the Receipts Derived from the Performance by the Particular User.

The economics of the performance branch of the entertainment industry are ordinarily geared to apportionment of royalties on the basis of the receipts of a particular user. Thus the royalties paid to the author of a play are a percentage of the box office receipts; the royalties paid by a commercial broadcaster are related to its receipts from advertisers; the royalties paid by symphony orchestras are related to their budgets or potential box office and so forth.

This long-standing practice is rooted in both logic and fairness. It means that the royalty paid by each user is commensurate with the "value received" from the performance by that user, a value judged by an essentially objective standard—the amount paid by the public to the particular user offering the performance to the public. Thus petitioner's argument about "double payments" is entirely misplaced. It assumes, contrary to the reality of the situation, that the only "payment" for the use of a copyrighted work is the first one. It would be more accurate to state that that is just one aspect of the total payment made by the public. "Payment" then is the total amount the public pays, in manifold and various ways, for the benefits derived from use of the copyright proprietor's work. Some examples should make this quite clear.

A symphony orchestra pays a relatively small fee for its use of musical compositions. This small fee recognizes the fact that the great majority of symphony orchestras are not money-making institutions. But what if a major radio or television network picks up the performance (a

not uncommon occurrence) and obtains commercial sponsorship for the broadcast (or obtains spot announcements to be broadcast at appropriate times during the program)? Should not the composer be permitted to require payment from this commercial user? The station's receipts are far greater than the orchestra's. If the composer were left to just what he could get from the orchestra he would hardly find composing an engaging way of earning a livelihood. And society would be the loser, the purpose of the Copyright Clause of the Constitution frustrated. In many cases, the orchestra's performance is picked up by an educational television station. That station pays nothing to the composer, reflecting its views of the monetary value of the performance to the station. Then the broadcast is picked up by a privately owned commercial cable television system, and delivered to its audience in disregard of any obligation to pay for the entertainment material which makes the cable system's business possible and profitable, the composer would have very little to show for his efforts, the public will have been culturally enriched by his contribution, and the cable television owner will enjoy a monetary enrichment, however unjust.

If the public makes its payment only to the commercial CATV system, and the latter pays nothing to the author, the author will get nothing for his labors. As long as the public is paying to hear or see a performance, the author is entitled to his fair share of all the payments made by the public for the performance. That was the test employed by this Court in *Herbert* v. *Shanley Co.*, 242 U.S. 591.[5]

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[5] The foregoing examples indicate the serious drawbacks to the proposals that there be an exemption for the cable systems, even for programs which they retransmit within the Grade B contour of the television broadcasting station from which the program originates. It is clear that the impact on the copyright proprietor who grants non-exclusive licenses available to all users will be the same whether the retransmission is in the Grade B contour or beyond.

Even where the original transmission has resulted in some rewards to the composer, that should not give the cable system the right to a free ride. For instance, a television network may broadcast the musical program presented during half-time at a professional football game. The network will pay a royalty which reflects its receipts from network sponsors (the football organization itself pays only a nominal royalty for all of its uses of music in the stadium). The broadcast will be relayed to the network's local stations which also pay a royalty based on their receipts from local sponsors. The cable system may pick up the game from a distant local station—neither the network's advertisers nor that station's advertisers have paid for delivery of their messages to the cable's viewers and once again copyright proprietors will be denied appropriate reward.[6]

III

Exemptions Are Dangerous. An Exemption Created to Favor a "Young" Industry Cannot Be Removed if it Becomes a Giant. CATV Is Likely to Become the Dominant Financial Force in the Communications Industry.

Unless there is an express statutory exemption, as in the case of coin-operated machines (juke boxes), copyright owners are entitled to expect payment for performances of their musical works from which profits are derived. The juke boxes of 1909 were a novelty located in penny parlors where they were regarded as "an advertising medium".[7]

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[6] If only the "first" payment to the copyright proprietor is counted, then copyright owners will reap paltry rewards indeed for their efforts—just the nominal sums paid by the colleges, while the television stations continue to obtain huge sums from sponsors for carrying the games during which the music is played.

[7] H. R. Rep No. 2222, 60th Cong., 2d Sess. 9 (1909).

As such, the industry was exempt from application of the performance provision of the copyright law. The statute provides that its performance "shall not be deemed a public performance for profit . . ." (17 U.S.C. § 1(e)). Today the juke box industry collects more than $500,000,000 annually for the performance of musical works. It is the largest commercial user of music but it pays nothing to the copyright owners because of an exemption intended to apply to what was then considered a minor infant industry.

To the extent that payments for the performance come out of the public's pocket, there is no reason to deprive the copyright owner of his fair share of such payments.

Payments by subscribers to whom performances are furnished—as in the case of cable television—may largely replace payments by advertisers. The present method of financing commercial broadcasting may be only a temporary phase in the long history of mass communication.

Initially, a broadcasting station was an adjunct to another business which the station advertised, *M. Witmark & Sons* v. *L. Bamberger & Co.*, 291 Fed. 776 (D.N.J.). Then payments were derived from the sponsorship of programs by individual advertisers; now network broadcasters sell announcements to national advertisers; their local affiliates sell announcements to local advertisers, and CATV operators sell a "subscription service" to individual recipients of the program.

The sources of payment for the performance may change and the forms of energy conversion for delivering it may change, but whether the business is that of a network, or an affiliated station or a cable television service, the object of the enterprise is identical—to profit from performances which are public because they are intended for reception by a substantial number of people.

IV

There is Nothing in the Communications Act of 1934 to Support an Exemption of CATV.

Petitioner argues that public policy as laid down in the Communications Act of 1934 demands that broadcast programs shall receive as wide a dissemination as possible, and that this policy would be thwarted if anyone carrying a broadcast program to the public is required to pay for the use of copyrighted works. This ignores the fact that the Act of 1934 is silent on the subject; that before 1934 the courts had already imposed copyright liability on one who profited from public dissemination of such a broadcast—specifically, on the broadcaster himself (*M. Witmark & Sons* v. *L. Bamberger & Co.*, 291 Fed. 776 (D.N.J.); *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F.2d 411 (C.A. 6), *cert. denied*, 269 U.S. 556) and on hotels picking up the performance (*Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191); and that the Act of 1934 did not in any way purport to legislate concerning the use of copyrighted works.

If Congress had intended that there should be no copyright liability for participation in such performances it would have expressly so provided in the 1934 enactment. Property rights of copyright owners long recognized by the courts should not be abrogated by inferences drawn from a statute intended to regulate the conduct of an industry which reproduces (rather than produces) copyrighted works. The Communications Act regulates the monopoly rights given to broadcasters in their respective communication channels. The freedom of the air waves insured by the Communications Act does not mean that those who control the channels of communication (broadcasters or CATV operators) shall enjoy freedom from payment for use of the works that make their enterprises profitable. The composer of a song has created an original

work. The Constitution empowers Congress to make this the subject of ownership in the form of exclusive rights under the copyright law. The broadcaster, by the Communications Act, is given an exclusive franchise to control certain channels of communication. Those channels should be kept as open as possible. It is clearly not necessary to expropriate rights of authors to carry out that policy.

It must be remembered that those who create and publish literary or musical properties have no rights in their works except those created by Congress. *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225; *Compco Corp.* v. *Day-Brite Lighting Inc.*, 376 U.S. 234. The Copyright Act expressly grants the exclusive right of performance. Cable television would not exist as a commercial enterprise if it did not furnish performances of copyrighted works to its subscribers. That is what the public pays for. The rights which Congress secures to authors under the copyright law must not be narrowly construed in any case such as the one now before the Court, where the public pays petitioner for the privilege of enjoying a performance of the copyrighted work. *Herbert* v. *Shanley Co.*, 242 U.S. 591, 594.

The Constitution expressly empowers Congress "to secure to authors . . . exclusive rights in their writings. . . ." If an exemption is implied in favor of commercial cable television systems, the right of "public performance for Profit" is no longer exclusive. There is no reason for granting such an exemption to commercial interests under a statute enacted pursuant to the Commerce clause of the Constitution.

If the policy of the Communications Act of 1934 makes it mandatory for CATV stations to have access to all programs of stations in the Contour "B" area, that policy can be implemented by an FCC regulation barring television stations from broadcasting copyrighted works unless some arrangement is made authorizing CATV systems in

that area to include those works on the programs they furnish to subscribers. But there is no such provision in the Communications Act and there is no basis for reading into it a provision that nullifies a right expressly granted to authors under the Copyright Act.

Petitioner cites Senator Dill's statement in introducing the Radio Act of 1927 that "radio in the United States is free" (Pet. Br., p. 80) apparently to support the proposition that CATV should be freed from any obligation to compensate the authors of the copyrighted materials they furnish to their subscribers. It is true that Senator Dill felt that radio should not be required to pay royalties to authors. He introduced S. 2600 to that effect in the First Session of the 68th Congress in 1924. In supporting the bill he advanced the same type of argument against alleged "double payment" that petitioner has advanced here. He said (*Hearings on S. 2600 Before a Subcomm. of the Senate Comm. on Patents,* 68th Cong., 1st Sess., at 3-4 (1924)):

> I believe that when the man who has created music has received his copyright fee, which he is entitled to have, from those who purchase his music, and that copyright fee has been paid, that that ought to be enough, and especially it ought not to be applied to the development of this art by these radio broadcasting stations all over the country.

But Congress did not accept that proposal then; the courts have uniformly rejected it since then, and it is submitted that this Court should not accept it now.

V

The Possibility that Some Copyright Owners May Misuse Their Copyrights is no Reason for Granting to CATV an "Implied License" to Perform all Copyrighted Works for their Profit.

Music is available to all on a nonexclusive basis through licensing organizations that have answered the special needs of manifold users presenting multiple performances. The system has worked well in practice. This is not challenged by CATV operators. There is no reason for permitting CATV to expropriate those works without payment under guise of an "implied license."

The petitioner has raised certain antitrust fears—the possibility of misuse of copyrights by combinations of copyright owners and broadcasters bent on denying programs to wire television. The "misuse" aspects of this case, however, have been postponed for consideration at a later date (255 F. Supp. at 182). In its antitrust argument, petitioner refers to a statement of Mr. Edwin M. Zimmerman of the Department of Justice at a recent Congressional hearing (Pet. Br., pp. 62-64). It omits, however, a part of the transcript in which Mr. Zimmerman stated that his remarks were inapplicable to works licensed by ASCAP:[8]

> Mr. Brennan [Counsel for the Committee]: Just one or two questions, Mr. Chairman.
>
> Is not ASCAP at the present time regulated by a federal antitrust consent decree?
>
> Mr. Zimmerman: Yes, it is.
>
> Mr. Brennan: With respect to their rates?
>
> Mr. Zimmerman: Yes.

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[8] *Hearings on S. 1006 Before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary*, 89th Cong., 2d Sess., (Vol. 8 of Report of Proceedings), at 416-417 (1966).

Mr. Brennan: Do you believe there is any need for an exception with respect to copyright rates where these are already regulated by antitrust consent decree?

Mr. Zimmerman: I am sorry, I did not hear the question.

Mr. Brennan: Is there a need for exception from copyright liability with respect to copyright works which already are regulated by the antitrust consent decree?

Mr. Zimmerman: I do not know of any such need.

Mr. Brennan: That is all.

Indeed, a case recently before this Court on application for certiorari shows in detail the compliance of ASCAP with the antitrust laws of the United States. *K-91, Inc.* v. *Gershwin Publishing Corporation,* 372 F.2d 1 (C.A. 9), *cert. denied,* 36 U.S.L.W. 3280 (U.S. Jan. 15, 1968).

The Solicitor General's brief in the case at bar refers to possible control of television programming by three networks and seven major movie studios and the importance of avoiding "the imposition of the structure of these older industries on the young CATV industry which could occur were the networks and film studios to obtain control of CATV systems" (p. 7, n. 4).

The CATV industry is far more powerful and has a much more promising economic future than all the composers and authors of American musical works put together —including their publishers. Vigorous enforcement of the antitrust laws should be a sufficient deterrent to anti-competitive practices, without sacrificing the rights of individual composers and authors. The antitrust division has succeeded in preventing the members of ASCAP from misuse of their copyrights. It is not likely that the Department of Justice will hesitate to enforce the antitrust laws against any interests which may attempt to "impose their structure" on the CATV industry.

Conclusion

It is submitted that commercial cable television operators are engaged in performing works to the same extent as broadcasters or hotel owners picking up performances and delivering them to their public; that their involvement and commercial stake is far greater than that of many broadcasters, particularly those in the UHF and educational fields; that the policy of the copyright law requires that these commercial users fairly compensate copyright owners in accordance with the scope of their performance of the copyrighted works, and that each commercial presentor should pay his fair share of the amount paid by the public to him for the performance. Certainly no valid reason has been advanced to read into the Copyright Law an implied exemption in favor of commercial wire television.

Respectfully submitted,

HERMAN FINKELSTEIN
SIMON H. RIFKIND
JAY H. TOPKIS
PAUL S. ADLER
Attorneys for Amicus Curiae
575 Madison Avenue
New York, New York 10022

Of Counsel:
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
575 Madison Avenue
New York, New York 10022

February 1968

Exhibit A*

[LETTERHEAD OF]

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS
575 Madison Avenue
New York, N. Y. 10022

September 6, 1966

Hon. Quentin N. Burdick,
Acting Chairman
Committee on Patents, Trademarks
and Copyrights
United States Senate
Washington, D. C.

Re: S. 1006—Supplement to
Statement of August 25, 1966

Dear Mr. Chairman:

When I appeared before the Committee in rebuttal on August 25, I emphasized the financial power of the CATV operators for whom the Department of Justice was seeking an exemption from the requirements of the Federal Copyright Laws. Attached is a survey showing that only 25 group owners of CATV systems own in the aggregate over 650 CATV franchises and have applications pending for almost 400 more.

I also mentioned that J. Leonard Reinsch, President of the Cox Broadcasting Corporation, and Retiring Director of the National Community Antenna Association had referred to copyright fees as "a normal cost of doing busi-

* Printed in *Hearings on S. 1006 (Copyright Law Revision—CATV) Before the Subcomm. on Patents, Trademarks, and Copyrights of the Sen. Comm. on the Judiciary*, 89th Cong., 2d Sess., at 237 (1966).

ness." His entire statement on this subject reads as follows (National Community Television Association Bulletin, July 18, 1966):

> "THE COPYRIGHT QUESTION:
>
> "A recent court ruling, currently subject to appeal, implies that CATV operators may be required to pay fees for the privilege of transmitting copyrighted material to cable television subscribers. It has been suggested that this would impose a critical financial burden on the operators. In our opinion, the alarm is not warranted. Copyright fees are a normal cost of doing business in many fields. As in radio and television today, they would constitute a relatively small element in the total cost of providing a service desired by the public."

In addition, I should like to call the Committee's attention to a similar statement in a current prospectus of the Teleprompter Company, indicating that they can pay such royalties without any materially adverse effect on the company, even though Teleprompter's "principal activity is the ownership and operation of community antenna television (CATV) systems in sixteen communities throughout the United States." Referring to the case of *United Artists Television, Inc.* v. *Fortnightly Corp.* (and a similar case pending against Teleprompter) the prospectus states:

> "Even if plaintiffs ultimately prevail in either or both actions, management of the Corporation believes that the effect on the Corporation will not be materially adverse."

In any event, as the Department of Justice concedes, where rates of copyright owners are already regulated under the antitrust laws, as in the case of ASCAP, there is no need of granting a copyright exemption to CATV.

Exhibit A

It is submitted that if any concession is to be made to CATV, it should be done under the *Commerce* clause of the Constitution, and not the *Copyright* clause. The Commerce clause enables the FCC, if deemed necessary, to require stations holding a television license, to obtain rights for CATV operators for their contour "A" area; it also enables the Department of Justice to insist on rate regulation in cases of collective licensing. These avenues are open if resort to them is needed.

No case has been made for an exemption of CATV—a commercial operation—under the copyright law. The lights of authors should not be made subservient to the claims of private commercial interests. This was done in 1909 with respect to coin-operated machines. The precedent should never have been established. It is unsound and is not likely to be continued. It certainly should not be extended.

I appreciate the permission extended by the Committee to appear in rebuttal, and this further opportunity to supplement my extemporaneous remarks.

Respectfully submitted,

Herman Finkelstein

HF:J
att.

25 GROUP OWNERS OF CATV SYSTEMS

NUMBER OF FRANCHISES, FRANCHISE APPLICATIONS PENDING AND OWNERSHIP OF TV AND RADIO STATIONS

	Number of Franchises		Number of Applications Pending		Ownership of TV and Radio Stations			
					TV		Radio	
					UHF	VHF	AM	FM
General Tire And Rubber Company*		72		6	WHCT	WOR	WOR	WOR
Vumore (Oklahoma City, Oklahoma) 100%	35)		2)			WNAC	WNAC	WRKO
H & B Communications (Beverly Hills, California) 30%	37)		4)			KHJ	KFRC	KFRC
						WHBQ	WHBQ	WGMS
							WGMS	CKLW
							CKLW	
Jerrold Corporation (Lehigh, Pennsylvania)		41		51				
Cox Cablevision Corporation (Dayton, Ohio)	15)	40	13)	30		WSB	WSB	WSB
Trans Video Corp. (17%) (El Cajon, California)	10)		1)			WSOC	WSOC	WSOC
Finer Living, Inc. (25%)	1)		5)			WHIO	WHIO	WIOD
Columbus Communication Corp. (Columbus, Ohio)	3)		1)			KTVU	WIOD	
Buckeye Cablevision (45%)	4)		2)			WIIC		
Cleveland Area TV (45%)	3)		2)					
Georgia Cablevision Corp. (80%)	4)		–)					
Capital Cablevision	–)		6)					
American Cable TV, Inc. (Phoenix, Arizona)	30)	37	9)	9				
Also interest in & operates Community TV Reception Co. (Sherman Oaks, California)	5) 0							
Also interest in: Savannah TV Cable Co.	1)		–)					
Cable-Vista, Inc.	1)		–)					
Telesystem Corp. (Glenside, Pennsylvania)	29)	36	21)	55				
Also interest in Pioneer Valley Cablevision (Keene, N. H.)	7)		34)					

* In addition to owning 16 radio and TV stations, General Tire and Rubber Company owns the Yankee Radio Network.

Exhibit A-4

Exhibit A

	Number of Franchises	*Number of Applications Pending*	*Ownership of TV and Radio Stations*			
			TV		*Radio*	
			UHF	*VHF*	*AM*	*FM*
Telesis Corporation (Chicago, Illinois)	13) 35	19) 55				
Minnesota All Channel Cablevision (80%)	8)	26)				
Russell, Kansas franchises (80%)	1)	–)				
Telesis Engineering (100%)	13)	9)				
Nebraska City Cable TV, Inc.	–)	1)				
Gregg Cablevision, Inc. (Nashville, Tennessee) (Lin Broadcasting Company)	30	8	WTVP		WMAK WAKY KEEL KAAY	
United Utilities (Kansas City, Missouri)	29	11				
Television Communications Corp. (New York, N. Y.)	26	–				
Community TV, Inc. (Bozeman, Montana)	26	1				
American Cablevision Co. (Beverly Hills, California)	25) 25	1) 2				
New England Video Co.	–)	1)				
Teleprompter Corporation (New York, N. Y.)	25	2				
Jefferson-Carolina Corporation (North Carolina)	25	42		WBTV WBTW WFMY	WBT WBIG	WBT
General Telephone & Electronics Corp. (New York, N. Y.)	24	13				
Triangle Publications, Inc. (Philadelphia, Pennsylvania)	23	12	WLYH KFRE	WFIL WFBG WNBF WNHC	WFIL WFBG WNBF WNHC KFRE	WFIL WFBG WNBF WNHC KFRE
Video Cable Systems, Inc. (Huntsville, Alabama)	21					

Exhibit A

	Number of Franchises	Number of Applications Pending	Ownership of TV and Radio Stations			
			TV		Radio	
			UHF	VHF	AM	FM
Meredith-Avco (New York, N. Y.)	15) 21	28				
Shared with Jerrold Corporation	3)			WHEN	KPHO	WWDC
Through Tennessee Cablevision	3)			WLW-T	WLW	WOAI
				WLW-C	WWDC	WOW
				WLW-I	WOAI	KCMO
				WOAI	WHEN	KOIT
				WOW	WOW	
				KPHO	KCMO	
				KCMO	KYA	
				WLW-D		
Central California Communications Corp. (Salinas, Calif.)	20) 21	4		KSBW	KSBW	KSBW
Shared franchise with Vumore	1)			KSBY	KNGS	KSBY
General Electric Cablevision Corporation (Schenectady, N. Y.)	21	27		WRGB	WGY	WGFM
				WSIX	WSIX	WSIX
Reeves Broadcasting Corporation (Charleston, S. C.)	21	6		WUSN	WKEE	WKEE
				WHTN	WITH	WITH
National Transvideo, Inc. (Dallas, Texas)	17	1				
Newchannels Corporation (Newhouse Broadcasting)	17	24	WSYE	WSYR	WSYR	WSYR
			WTPA	WTVI	WAPI	WAPI
				WAPI	KOIN	KOIN
				KOIN		WTPA
Tower Antenna, Inc. (Coshocton, Ohio)	14	7				
Skagit TV Cable Co., Inc. (Seattle, Washington)	12					
Long Island Cablevision Corp. (Riverhead, N. Y.)	12					
	671	394				